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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1907

No. 60.

PRISCILLA BRADFORD, Appellant

vs.

ROBERT E. MORRISON, Appellee

BRIEF OF APPELLANT

APPEAL FROM SUPREME COURT, TERRITORY OF ARIZONA

E. M. SANFORD,
Attorney for Appellant

(20,667.)

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1907

No. 280

PRISCILLA BRADFORD, Appellant

vs.

ROBERT E. MORRISON, Appellee

BRIEF OF APPELLANT

STATEMENT OF CASE.

This is a statutory action brought in the District Court of Yavapai County, Arizona, against Appellee, Elmer McDowell and Thomas D. Bennett, to quiet interests in the Blind Girl, Henry Clay and Washington unpatented mining claims, in Big Bug District, Yavapai County, Arizona. McDowell and Bennett did not answer. Mr. Morrison, as the assignee of Bennett, filed an amended answer (Tr 5) containing a special denial that Appellant is the owner of the property; it sets up that he is the assignee of Thomas D. Bennett of a certain judgment recovered in the same court on December 29, 1899, for the sum of $2,730.25, with interest and costs, recovered in case No. 2611, wherein Thomas D. Bennett is plaintiff and Tom Taylor and E. G. Wager are defendants, and duly docketed December 30, 1899, at page 149, of Book 2 of Judgment Docket records of the Clerk's Office of the same court, and alleges that said judgment is a lien on said mining claims.

The case was submitted to the trial court on an agreed statement of facts (Tr 21), which resulted in a judgment quieting the plaintiff's interests to an undivided three-fourths of the loca-

tions as against the defendants; and, quieting Appellee's interests as against the plaintiff and the other defendants as to the remaining one-fourth of the locations. (Tr 6.)

An appeal was taken to the Supreme Court of the Territory and the judgment affirmed. (Tr 53.) The appeal was taken to this court (Tr 54) upon a statement of facts found by the Territorial Supreme Court. (Tr 46.)

STATEMENT OF FACTS.

Briefly, the mining claims in controversy are unpatented lode claims. (Tr. 48-Fdg. 11.) The judgment in Bennett v. E. G. Wager was rendered December 23, 1899, and docketed December 30, 1899. (Tr. 47-Fdg. 6.) On December 23, and continuously thereafter until August 27, 1900, the actual co-owners of said mining claims were: D. C. Wood, one-half; said E. G. Wager, one-fourth, and Reese M. Ling, one-fourth. (Tr. 47-Fdg. 7.) On August 27, 1900, Wood, Wager and Ling, by a mining deed, conveyed these claims to the McCabe Extension Mining and Milling Company, a corporation (Tr. 47-Fdg. 8), and contemporaneously with the delivery of that deed the grantors placed the corporation in the actual and exclusive possession of said mines. Said corporation and its assignee (the plaintiff) has thenceforward continuously been and is now in the actual and exclusive possession of said mines and exclusively performing each and every year after the year 1900, to this date (findings filed January 23, 1907, Tr. 50, Folio 108), annual labor in excess of the amount of $100.00 per annum upon each of said claims. Said corporation during its said possession expended more than $40,000.00 in improvements in and on said mine. (Tr. 47-48-Fdg. 9.) Wager, Wood and Ling (the grantors of the corporation), nor either of them, nor any one for them, have not since August 27, 1900, been in the possession of any of said mining claims, and they nor anyone for them, or either of them, have

not since that date, done or performed on said mines or either of them any work, labor or improvement constituting annual labor required by the mining laws of Congress to be done on lode claims. (Tr. 48-Fdg. 10.) Plaintiff claims under conveyances through sundry execution and judicial sales made under writs issued on judgments rendered against the corporation and is in the actual and exclusive possession. (Tr. 48-49-Fdgs. 12-13-14.) Under one of said sales a deed was delivered to plaintiff on October 26, 1904 (Tr. 49-folio 104), and related back to November 6, 1902, the date of the filing of the lien. (Tr. 48-Fdg. 12.) Since the commencement of the action a deed under a judicial sale made on another like judgment has been delivered to plaintiff. (Tr. 49-folio 105.) Under another like judgment plaintiff also claims under a certificate of sale . (Tr. 49, folio 106.) On November 29, 1904, an execution was issued on the judgment of Bennett v. Wager, et al., and levied upon an undivided one-half of the mining claims as the property of said Wager and the sale under that levy occurred on December 22, 1904, to the defendant Morrison (Appellee here), and a certificate of sale was issued to him for that interest. (Tr. 49-50, Fdg. 15.)

ASSIGNMENTS OF ERROR.

Assignment One. That there was error of law in determining that the docketing of the judgment in Bennett v. Wager on December 30, 1899, in the office of the Clerk of the District Court of Yavapai County, under the provisions of Section 4, Act 56, Session Laws Arizona 1891, and re-enacted in Par. 2882, R. S. Ariz. 1901, as follows:

"Sec. 4. Every such judgment, when so docketed, shall for a period of five years from the date of the rendition thereof, be a lien on the real property in the county where the same is docketed, except the homestead of every person against whom such judgment shall be rendered and docketed, and which he may

have at any time thereafter within the period of five years," created a lien against the interests of E. G. Wager in the unpatented mines in controversy.

Assignment Two. There was error in law in holding that there was not an abandonment, in fact and in law, by E. G. Wager of his interest in said mining claims by reason of the making and delivery of the deed by himself and others dated August 27, 1900, conveying the mining claims in controversy to the McCabe Extension Mining and Milling Company and contemporaneously therewith putting the company in the peaceable and exclusive possession thereof, and, in further holding that the alleged general lien of said judgment thereafter continued against said property.

Assignment Three. There was error of law in holding that the levy made under the execution tested November 29, 1904, issued upon the said judgment of Bennett v. Wager, created a special lien against said property that related back to the date of the docketing of said judgment, and that the sale of said Wager's interest in said mining claims, under said execution, to the appellee, vested in him an interest or title, prior and paramount to the interest, possession and title of the appellant.

Assignment Four. The judgment is contrary to the land in that an unpatented mining claim is not the subject of a judgment lien, and if it were, the lien was destroyed by the judgment debtors abandonment on August 27, 1900.

ARGUMENT.

Assignment of Error One.

Did the docketing of the Bennett-Wager judgment on December 30, 1899, create a general lien on the unpatented mining claims in controversy?

The statute then in force and quoted in the assignment, reads:

"Sec. 4. Every such judgment, when so docketed, shall for a period of five years from the date of the rendition thereof, be a lien on the real property in the county where the same is docketed." * * *

Construction. "Real property" as used in this statute means a free hold estate—a legal estate. The peculiar sense in which a word is used is to be determined by the context of the statute. By collecting from the intention of the legislature, the terms are to be understood as having a regard to the subject matter; for that, it is to be remembered, will always be in the eye of the framer of the law, and all his expressions directed to that end. Thus, the term "Maintenance" is in itself and abstractly, equivocal; but when we find the statutes in which it occurs directed against the encouragement of litigation, and the upholding of parties to suits, we easily perceive what was designed to be presented. Potters-Dwarris Stat. (1st Ed.) 196-201. The meaning of a word which is susceptible of different meanings must be determined from the context, and the subject matter of which the law makers are speaking. Perrin v. Chesapeake Co., 9 How. 190.

Courts, in defining the term "Real property" in judgment lien statutes, have followed that line of definition which has recourse to and involves jurisdiction of courts over like estates, and give to the term a construction applicable only to those estates in which the common law court had jurisdiction, namely, legal estates and in this sense, the term is aplied to quantity or degree of estate so that reference must be had to common law proceedings for the collection of a judgment for a correct interpretation.

Estates. The term "estate" in its broadest sense means the condition or circumstances in which the owner stands with reference to this property, or, as applicable to this case are divided into legal and equitable estates.

Legal Estates. The term "real estate" is such an interest in

things real as is cognizable in and will be protected by a court of law—a freehold estate which is classified as an estate of indeterminate duration, other than an estate at will or by sufferance, and includes an estate in fee simple, for life, widowhood or during coveture. An estate less than a freehold is classed either as a chatter or an equitable estate.

The elements of a lien are: 1. Jurisdiction to render judgment. 2. Statutory authority to docket and docketing, and, 3. Real property.

In Jeffry v. Moran, 101 U. S. 285, the court speaking of judgment liens, said:

> "No reasoning can successfully maintain that a claim merely in judgment, and a judgment lien are the same thing, in legal effect any more than in fact. To hold otherwise would be to make the law, and not simply to apply it. It is only when a claim has ripened into a judgment, where there is property to be bound by it that a lien can subsist. This element is indispensable under the law to such a result."

In Merry v. Hallet, 2 Cowen 498, it is said that a judgment is a lien on freehold estates only, and the term "real estate" when applied to an interest in lands or other real property includes all estates or interests in such real property which are held for life or some greater estate. Westervelt v. The People, 20 Wend. 417. So the lien can attach only upon property in which the debtor has a vested legal interest. People v. Irwin, 14 Cal. 434. Riley v. Nance, 31 Pac. 1126. Sommerville v. Stockton &c Co., 76 Pac. 246. "At common law a judgment did not attach to a mere equity, though the equity was accompanied by possession. This rule of the common law prevails in several of the United States, and is generally applied in the absence of any statute undoubtedly creating a different rule." 2 Freeman Judgment, (4th Ed.), Sec. 348. See, also, Smith v. Ingles, 2 Or. 43; Bloomfield v. Humason, 11 Or. 229, 4 Pac. 332, Nessler v. Neher, 18 Neb. 649,

26 N. W. 471; Terrell v. Prestel, 68 Ind. 86, Baird v. Kirtland, 8 Ohio, 21, Harrington v. Sharp, 1 G. Greene, 131, Merry v. Hallet, 2 Cow. 497, Modisett v. Johnson, 2 Blackf. 431. And while the tendency of American statutes upon the subject is to make judgments a charge upon whatever estate the debtor may have, without regard to whether his title is legal or equitable (12 Am. & Eng. Enc. Law, p. 107), it is firmly settled by the authorities above cited that, in the absence of such a statute no lien or charge is created against an equitable interest or estate by the docketing of a general judgment. Our statute (section 5132, 2 Ballinger's Code; section 460, Hill's Code) makes the judgment a lien upon "the real estate of any judgment debtor." In construing a similar statute the supreme court of Iowa, in Harrington v. Sharp, supra, say: "By the language 'real estate of the person' we understand that the fee simple, or estate of inheritance, must be in the person, in order to have the judgment against him operate as a lien upon the land." And under the authorities such a statute does not make the judgment a lien upon the equitable estate of the judgment debtor. Neither at common law nor under our statute is such an interest affected by the docketing of a general judgment.

Phoenix &c Co. v. Scott, 54 Pac. 779.

Equitable Estates. At common law a judgment was not a lien on mere equitable estates.

Massingdale v. Downes, 7 How. 760.
Morsell v. Bank, 91 U. S. 360.
Cooke v. Avery, 147 U. S. 389.
12 Am. Enc. of Law, 1st ed. 103 note 3.
Sommerville v. Stockton Milling Co., 76 Pac. 246.
Bloomfield v. Easton, 45 Pac. 681.
Merry v. Hallet, 2 Cow. 497.
In re Estes, 3 Fed. 141.
Sweezy v. Jones, 21 N. W. 47.
Nessler v. Neher, 26 N. W. 47.
Jenkins v. Fahey, 73 N. W. 362.

The conclusions to be drawn from these decisions are: That without the aid of the statute there can be no lien under the term "Real property" upon chattels real, or equitable estates without the addition of equivalent language which would include such chattels and estates. The reasons for the rule are well given in Brandies v. Cochran, 112 U. S. 330, appealed from Illinois, where the lien statute ran against "all legal and equitable rights and interests in land," and in Commissioners Freedman Saving and Trust Co. v. Earl, 110 U. S. 712, where it is said:

> "At common law executions upon judgments could not be levied upon estates merely equitable because courts of law did not recognize any such titles and could not deal with them, and this is true, although the equitable estates were such as could be assigned, conveyed, or devised, and were subject to the rules of descent applicable to real estate. The statute of frauds, 29 Car. II. c. 3, did not extend to chattels real. The effect of this statute was to enlarge the operations upon legal estates, so the corresponding equitable remedy as to equitable estates was also enlarged. The ground of the jurisdiction therefor, is not that of a lien or charge arising by virtue of the judgment itself, but of an equity to enforce satisfaction of the judgment itself."

What is the nature of the interest which a judgment debtor holds as locator or assignee of the locator, in an unpatented mining claim?

Prior to the opinion by Associate Justice Peckham, in Black v. Elkhorn &c Co., 163 U. S. 445, there seems to be an uncertainty and wide difference of opinion as to the nature of this estate. At common law there is no classification of estates or interests in lands that can be properly applied to this statutory grant. It may be termed a chattel in the sense that it is an asset. As an estate in possession it is subject to inheritance and is assignable by the voluntary act of the locator or his assigns. It may be said to be a chattel real as it is inheritable and assignable by the terms of the grant, and as such would be personal property. The

common law term of easement has often been applied, but that is only similar in that there is a dominant and servient right. It is unlike this grant, in that at common law an easement is not assignable or inheritable, yet is the subject of dower under the common law and community interests under the civil law. The two are alike in that an easement may be made, and this grant is made, subject to conditions subsequent.

Ballinger on Mines, 54.
10 A. & E. Enc. of Law (2d ed.), 404. Note 1.

Salem &c Co. v. Stayton &c Co., 33 Fed. 154.

Under the federal decisions the interest of a locator in an unpatented mining claim is not the subject of dower or community interest.

Black v. Elkhorn M. Co., 163 U. S. 445.
McAllister v. Hutchinson, 75 Pac. 41.

The rights of the locator perhaps are more nearly analogeous to a "license" and "bond to convey" than any other terms of the common law. As a licensee "he has no interest, or property, or estate in the land itself, but only in the proceeds, and in such proceeds, not as realty, but as personal property."

Wheeler v. West, 11 Pac. 73.
Cowles v. Kidder, 41 Pac. 16.

There is no rent reserved. It stands as a permit to mine—a mere incorporeal hereditament.

13 Enc. Law (1st ed.) 539.
Lindley on Mines 860.

It is unlike the common law license in this, that there it could be revoked by the grantor, while here it is revokable only at the election of the licensee.

As a mining bond to convey he obtains no estate in the land, or vested right to purchase, or to claim a patent.

Benson &c Co. v. Alta &c Co., 145 U. S. 128.
Black v. Elkhorn &c Co., 163 U. S. 445.

There are conditions precedent to the creation of the right,

namely: Unappropriated public mineral lands; discovery and citizenship. These conditions complied with, a right of possession and operation is created, personal in character, yet subject by statute to inheritance and assignment. So long as the fee remains in the government these rights are subject to control through department rules and regulations as to cutting and using timber, character of work and other matters. The tenure is not of a determinate duration. The term is uncertain and is left to the locator's whim to terminate it through failure of conditions subsequent on his part. If he performs the annual labor for a given year, and he does not abandon the claim, the tenure runs to the end of the following year; at the end of that year one of two things must happen; if the term is to be extended the annual labor must be done for that year; otherwise, the tenure is terminated and there is a forfeiture to the public. If today he completes the annual labor for this year, to-morrow he may abandon the claim to the government. This is so, on the theory, that the ore shoots may be lost, a floor found, the vein may pinch out, or the indications fail, and of these matters he is the sole judge as to whether or not it will pay to labor further in his hunt for the precious metals on that location. In the event of forfeiture as above illustrated, as contradistinguished from forfeiture by advertising out, and by abandonment as here mentioned, the ground becomes, immediately, public lands and subject to location by any citizen. These are lawful rights vested in the locator and his assignee, by the grant itself, which cannot be questioned by any judgment lien creditor. These privileges do not come within the definition of a common law license for that was not inheritable or assignable. There is a contract to convey the fee dependent upon conditions subsequent, such as doing $500 worth of work; applying, under rules, for the purchase of the fee and paying the purchase price, but there is nothing in such pro-

ceedings that creates an estate in lands.

In Black v. Elkhorn M. Co., 163, U. S. 445, no name is given to these statutory granted rights but is described as:

> "(1) That no written instrument is necessary to create it. Locating upon the land and continuing yearly to do the work provided for by the statute, gives to and continues in the locator the right of possession as stated in the statute. * * * The interest in a mining claim is nothing more than a right to the exclusive possession of the land, based upon conditions subsequent, a failure to fulfill which forfeits the locator's interest in the claims. * * * The rights are personal to the locators, their heirs and assigns."

"Congress has seen fit to make the possession of that part of the public lands which is valuable for minerals separable from the fee, and to provide for an exclusive right of possession, while the paramount title to the land remains in the United States." In furtherance of this policy it was enacted: (13 Stat. at Law 441 Ch. 67, Sec. 9, R. S. 910) "That no possessory action between individuals in the courts of the United States for the recovery of mining titles should be affected by the fact that the paramount title to the land was in the United States, but that such case should be adjudged by he law of possession." Belk. v. Meagher, 104 U. S. 281. Manuel v. Wulff, 152 U. S. 505. Noyes v. Mantle, 127 U. S. 351 Congress at the passage of the mining laws evidently had in view that the granted rights in so far as possession and operation is concerned were chattel interests and similar rights under the terms easement and license not being inheritable or assignable at common law extended the rights to "heirs and assigns."

Interpretation of this statute by reference to collateral statutes.

The following statutes cannot be used as a legislative construction of the phrase "real property" as applicable to or fixing

the meaning of the term as used in the judgment lien statute.

Redemption. Sec. 2575 R. S. 1901 reads:

> "Upon sale of real property the purchaser is substituted to and acquires all the right, title and interest and claim of the judgment debtor thereto, and when the estate is less than a leasehold of two years unexpired term the sale is absolute. In all other cases including sales under order of court in foreclosure suits, the property is subject to redemption as provided in the following section. The officer selling real estate must give to the purchaser a certificate of sale."

In Sommerville v. Stockton &c Co., 76 Pac. 246, the court had under consideration section 700 of the Cal. C. C. P. identical with our 2575. It was there said: "Section 700, Code Civ. Proc. provides that 'upon a sale of real property the purchaser is substituted to and acquires all the right, title, interest and claim of the judgment debtors thereto; and when the estate is less than a leasehold of two years unexpired term, the sale is absolute,' and that otherwise it is subject to redemption as therein prescribed. This, however, cannot be considered as a legislative construction of the phrase 'real property,' applicable to and fixing the meaning of the same phrase where used in section 671, providing for judgment liens."

In People v. Westervelt, 17 Wendell 676, the judgment lien statute under consideration was against "lands, tenements, real estate, and chattels real," and speaking of the right of redemption, the court said: That a distinction was to be drawn between the statute permitting redemption and the judgment lien statute, and further says:

> "Looking at the system of lien and redemption, and seeing that the attention of the legislature was expressly drawn to the distinction between freehold and terms, with the course of previous legislation and decision upon that distinction, no question can remain that all such terms were intended to be left like other chattels, to an immediate sale and assignment by execution.

The only point in which they are made to resemble freehold is in subjecting them to the lien of the judgment.

Westervelt v. People, 20 Wend. 417.
Ex Parte Wilson, 7 Hill, 150.

Under this reasoning it would appear that there is no right of redemption in unpatented mining claims.

Descents and Distribution. Our statutes of descents do not define the quality or quantity of the estate in an unpatented mining claim that goes to the heirs. Such right of inheritance is derived from R. S. U. S. Sec. 2322, which provides that the locators, their heirs and assigns, shall have the exclusive right of possession, etc. The heirs are not parties to this suit, and the quantity of distribution, i. e. whether it descends as personal or real property, is not involved, but the subject is introduced to aid in the application of the rule of interpretation of the phrase "real property."

Congress has made said rights inheritable, but that does not change the nature of the rights. During the rise of the "South Sea Island Bubble" the people of England became so desirous of investing in its stock that an act was passed enabling guardians and other trustees to sell freehold estate and invest in the stock, and under it such procured stock and its proceeds descended as real estate, but that did not change the character of the stock from personal to real property. So, in McLean v. Rockey, Fed. Cas. 8, 891, it was said: "The Ohio code of 1837 and 1839, provided that a permanent leasehold estate should descend as land. This innovation, it would seem, should not change the nature of such an estate beyond the express words of the statute. It does not subject such an estate to the lien of a judgment. In Kentucky, by an express statute, negroes descend as real estate, and yet this does not make negroes land. The same quality, at the legislative discretion, may be imparted to any other personal property: that would not change the nature

of the legal designation of such property beyond the words of the statute."

Under Art. 5, Chap. IX., Tit. 17, Par. 213, et seq. R. S. Ariz. 1901, if any portion of an estate of a decedent, infant, or incompetent person shall consist of mining property a petition may be filed, ten days' notice given and the property ordered sold and a deed delivered on compliance with the order. A similar statute is enacted by Par. 1772 for mining claims, interests in mines or shares of stock. By Par. 1777 of the same laws real estate of a decedent is sold according to the general surrogate practice in disposing of lands and tenements. These special statutes are styled "Summary sales of mines and mining interests," and the method pursued is similar to the usual surrogate practice in selling chattels. From these authorities it would appear that the estate in an unpatented mining claim, upon the death of the owner, passes, as personal property to the personal representative and does not descend as real estate unless there be an express statute to the contrary.

Conveyances. Par. 733 R. S. 1901. (Par. 228, R. S. 1887) reads: "The term 'land' as used in this title is declared to mean and include mining claims."

This enactment as well as Pars. 2708 and 2848, R. S. 1901, confines the definition of "land" and "real estate" to the provisions of the title or chapter in which the definition appears, and so reserves the definition from application to other statutes. The "Title" relates to conveyances. It does not create or define estates. It provides for the evidence of transfers of title and the nature of estates described in the conveyance. The intention of Par. 228, evidently was to make transfers of the "estate in possession and inheritance" in a mining claim, evidenced by writing, but did it do so? The estate in an unpatented mining claim is "in possession" subject to a condition contingency or subsequent.

Its inheritable qualities are subject to these conditions. The right of inheritance may exist today but tomorrow and before death of the locator this right may be extinguished by abandonment or forfeiture in law and could not be a subject of contest by the heirs. The sections of that title in which the word "land" is used are 214, 216, 217. By 214, "no estate of **inheritance of freehold,** or for a term of more than one year in lands and tenements shall be conveyed unless the conveyance shall be declared by an instrument of writing." The use of the words "inheritance or freehold" refer to degrees of estate and should be construed according to their common law meaning, as they are technical words, well defined, namely: "Estates of freehold," again are either (1) estates of inheritance, which includes estates in fee simple, tail, and, in frank-marriage; or estates not of inheritance. R. & L. Law Dict. Estate, Sec. 9. Here estate in inheritance denotes a degree or quantity of estate, to-wit: A fee title. Estates in possession is not an estate in inheritance at common law. Par. 228 does not make estates in possession a part of the common law estate of inheritance. The locator has no fee in his estate. Yet the court's reason that because "lands" are to include mining claims whether patented or unpatented, and the estate in inheritance having been by act of Congress included in an estate in possession the transfer of these estates must be in writing, but even that does not make mining claims "Real property" within the meaning of the judgment lien act. Par. 216, possibly may include mining claims in the work "lands" where the conveyance purports to convey a fee when the mining claim is patented, but this is in conflict with Par. 217, where there is no limitation in the granting clause the degree of the estate conveyed "shall be deemed a fee simple title." These two sections possibly refer to degrees of estate, in the transfer of titles, to agricultural and town lands, and not to mining claims, for the legislature must take cogniz-

ance of an act of Congress, and that the mining laws grant only an estate in possession and inheritance, subject to conditions subsequent, retaining the fee in the government until paid for, and therefore when an unpatented mining claim is conveyed the legislature has no power to say that a fee estate is conveyed or that it shall be so presumed. Hence the word "lands" in Pars. 216, 217 ought not to include mining claims.

The most that Appellee can ask for Par. 733 (228) is that the word "lands" in Par. 214 is extended to mining claims for the purpose of having a writing instrument evidence the transfer to another.

Prior to this statute written conveyances were not necessary to transfer interests to another in unpatented mining claims.

Black v. Elkhorn M. Co., 163 U. S. 445.
Mining Co. v. Taylor, 100 U. S. 37.
Doe v. Waterloo & Co., 70 Fed. 459.

Par. 228, and similar statutes are for the benefit of and to protect the purchaser of, or the assignee of, the locator's rights.

Fraud and Fraudulent Conveyances. Par. 2708 reads: "The term 'real estate' as used in this title shall be deemed to include mines and mining claims."

This act refers to fraud and fraudulent conveyances and extends to mining claims the equitable remedies as provided by that doctrine. Expression is made in many cases that a mining claim is property (Black v. Elkhorn &c Co., 163 U. S. 445), but when so used it is in the sense that it is property "that goes to make up one's wealth," and is not intended to be used in reference to a degree of estate. It is in the sense of "assets" that the statute applies. While the conditions subsequent are personal to the owner in an unpatented mining claim, and the right of abandonment or forfeiture may be exempted from the equitable doctrine that ordinarily attach to fraudulent conveyances, yet,

that question is not involved in this case except as a matter of collateral statutory construction of the judgment lien statute.

If fraud in fact, under the doctrine of fraudulent conveyances, is to be considered as a foundation for a cause of action in advertising out, abandonment to another, or abandonment or forfeiture to the government, then it must be alleged and proven. There is no allegation or proof of fraud in fact in this case. This case is to be determined by applied law. The constituent elementary qualities which exist in this grant abhors the doctrine. The co-owner is given the right of failure to do his proportion of the annual labor and the grant gives to a co-owner the authority to advertise out the delinquent. Intent to defraud a creditor is not an element in the process. As between the government and the locator the only intent involved is that to abandon and forfeit, and the motive of that intent is not to be considered by the government. Congress must have had in view the doctrine of fraudulent conveyances when the act was created. It knew that it was possible for one co-owner to become involved in debt and might prevent a levy on his estate through pre-arrangements with another co-owner to advertise him out; or without a co-owner, he could abandon instanter, or forfeit to the government and thus deprive a creditor of a visionary asset property. A levy of execution pending delinquency would be of no avail to the creditor for the co-owner could in the course of an indefinite period, extending over a year and years, advertise out the delinquent, and this process would clear the estate of the delinquent from the results of the levy, and vest the interest in the co-owner who advertised the others out as against the levying creditor. Conditions subsequent were never the subject of this doctrine as applied to the servient owner. Jurisprudence requires that there be necessary parties to an action of fraud which includes participants and those who have received the benefits of the fraud.

The government does not participate in the acts of the locator, but defines and establishes what acts shall constitute abandonment or forfeiture and receives the benefits, yet the sovereign is a necessary party, but cannot be made such, for it cannot be sued. What contractual relations there are, if any, are between the government and the locator, in which neither the latter's creditors, nor the public, have any interest and cannot be heard to complain of the failure of a locator to perform any of the conditions of the grant established by the owner of the dominate estate. Are creditors, under these conditions to be permitted to come into court and say that a locator owes me: I know he did not do the annual work required by statute; this forfeiture is a fraud on me and the judicial department must compel the executive department to revest the locator with the estate so that the debt may be collected. This condition is the very one the statute is framed to and does prevent. If forfeiture and abandonment to the government—the strongest elements of the grant—are not the subjects of the doctrine, then abandonment by conveyance to another—a weaker element—and advertising out—the weakest element—are not the subject of fraud in fact or in law. It is a rule that the father may spank the child, but it is not customary for the child to spank the father until it becomes physically able. So, in legislative matters, the territorial legislative child may not pass laws inconsistent with the constitution and laws of the United States, yet, when an Arizona legislature reaches a physical condition, through statehood, it may be able to do some spanking with a law inconsistent with an act of Congress, but it is now constitutionally incompetent to exercise that power. The attempt of the territorial legislature to legislate into this Congressional grant, the doctrine of fraudulent conveyances, as applied to abandonment and forfeiture of estate, is ineffective for that purpose, and because of this, no judgment lien creditor can

apply, through the judicial department, the doctrine of fraud in fact or in law to abandonment of an unpatented mining claim, as that injects into the grant conditions not inacted or intended.

Limitation of Actions. Par. 2948 reads: "The words 'real property,' whenever used in this title is taken to include mines

This statute relates to the limitation of actions and extends only to the time in which proper remedies involving mining claims may be enforced.

Definition Statutes. Par. 2932. Sub Div. 5, R. S. 1887, in force in December 1899, reads: "The words 'real property' are co-extensive with lands, tenements and hereditaments."

This statute was repealed September 1, 1901, and before execution issued in this case. (Par 4234 R. S. 1901.) It was re-enacted March 5, 1907. Sess. Laws, 1907, Chap. 10, Sub. Div. 5, p. 8.

This is practically an adoption of the common law, and is well considered in the re-hearing case of Nessler v. Neher (Neb.), 26 N. W. 47.

Morsell v. Bank, 91 U. S. 360.

Cooke v. Avery, 147 U. S. 389.

When the meaning of these words in this statute are to be interpreted, reference must be had to the subject matter, thus: When "lands" in a conveyancing statute include mining claims the evidence of the abandonment to another, and not to the government, must be in writing, but it does not change the character of the estate; in judgment lien statutes, using the words "real property," reference is had to the degree of estate; in statutes relating to descents the inheritable qualities in unpatented mining claims are personal in their character to the heirs; the quantity of estate is not raised to a fee simple, but must be inherited as the nearest similar chattels at common law descend, unless there is a statute that abrogates the common law in this

respect; in fraudulent conveyance statutes, remedies which are applicable to "lands" are extended to the estates held in mining claims; in Limitation of Actions, reference is made only to time in which remedies may be enforced, and, in Remedial Statutes, like actions to "quiet titles," the term "real property" has a more flexible and extended meaning, for a complaint of this character not only includes all the chancery remedies applicable, but it covers the whole equity jurisprudence and adds additional equity jurisprudence to be applied to the intention of the statute creating the remedy.

In Buckingham v. Reeves, 19 Ohio 399, it was held that lands and water power upon the canals and rivers leased by the state are not subject to judgment liens, since such leases lack that character for permanency and stability which is requisite to elevate them to a standard of "lands and tenements," which alone are subject to judgment liens.

Statutory action to quiet title. The court below from which this action was directly appealed to this court by way of emphasizing its unfortunate construction of the term "real property," in its opinion, says: "Indeed, the action brought by the plaintiff herself to quiet her title is brought under the provisions of the statute authorizing actions to quiet title to real property, and can only be maintained under the statute upon the theory that such interest in the mining claims is real property." (Tr. 36, folio 76.)

Paragraph 4104, R. S. 1901, reads:

> "An action to quiet title to **real property** may be brought by any one having, or claiming, **an interest therein,** whether in or out of the possession of the same, against any person or corporation, or the Territory of Arizona, when such person, corporation or Territory claims any **estate** or **interest,** adverse to the party bringing the suit; in, or to the real estate, the **title to which** is to be determined or quieted by the action brought."

This statute creates a statutory remedy—"a judicial means of enforcing a right, or redressing a wrong"—defined in Zumalt v. Madden (Wyo.), 31 Pac. 400; to be "a suit in equity under the statute"; in Wall v. Magnes (Colo.), 30 Pac. 57, as a simple recognition in statutory form of "the familiar chancery proceeding" and by which "the scope of the equity proceeding thus defined is broader"; and in Goldsmith v. Gilliland, 22 Fed. 866, Deady, J. terms it "in the nature of a 'bill of peace.'" As a consequence it must include more than the remedies over which chancery courts have primary jurisdiction and more than where equity has authority to determine adverse claims to equitable **estates** and **interests**, the form of the bill being by statute abridged and controlled. Provision is made for actions involving tax assessments, liens and charges, by the territory, and creates an additional scope in equity jurisprudence.

Union & Co. v. Warren, 82 Fed. 520.
Ely v. R. R. Co., 129 U. S. 291.
Parley &c Co. v. Kerr, 130 U. S. 256.

The statute may be divided into: (1) The name of the remedy; (2) The subject matter in which the plaintiff's interest is claimed; (3) the interest in the subject matter; (4) the defendant who claims adversely; (5) the estate or interest claimed adversely; and (6) the determination of the title.

1. The name of the remedy, to-wit "quiet the title," with relation to chancery remedies is convenient, but is misleading as to the true nature of what is to be quieted. It is the interest that is to be determined and quieted and in this sense is a broader term than title, which is generally defined as "The means whereby the owner of land has the just possession of his property," and this "means" includes possession, right of possession, and the right of property. And. Dict., **Title.** The words "estate or interest" as used in the statute show that the latter is intended to have a different and more extended meaning than the former.

Interest is broader. It not only includes all these, severally and in combination, but it includes degrees and quantity of estate from freehold to estates in possession and this makes the meaning broader even than estates. It includes estates legal and equitable. It includes every right which cannot or need not be defined. It is any advantage that may be added to words of more definite meaning that no conceivable claim may be omitted. And. Dict. Interest. As here used it covers, the quieting of interests in statutory or vendors liens, licenses, statutory limited grants of possession, possessory rights, and then on up through the various degrees of estates and interests. In this the equitable jurisdictional element of being in possession is wanting.

2. The term "real property" as here used is something more than "lands, tenements, and hereditaments" in its comprehension of "all things of a permanent nature" or affixed to the earth surface by man; it includes possession, right of possession, right to property in all its degrees of estate, and whether such estate is legal or equitable. This remedial statute "possesses no limitation or restrictions, and we see no reason why it does not vest in the holder of an equitable title the right to come before the court, and have his equities declared superior to any and all opposing equities. If there are outstanding and antagonistic equities, we know of no sound policy which would deny claimants thereunder an adjudication upon them by virtue of the provisions of this section."

Tuffree v. Polhemus (Cal.), 41 Pac. 808.

The interest claimed by the party bringing the suit may not be exclusively a degree of estate, but may be more comprehensive or less definite in its measure.

5. The adverse estate is here used in its technical correct sense which is a definite denomination of a measure of interest, such as degree of estate, while interest is used in its broader

sense.

6. The determination of the title means the determination of the greater, or paramount, or priority, or right in estate or interest. Each may have estates of different measure or degree. Each estate may be determined in favor of each party and yet the greater estate be determined. As an instance, under this statute priority of mechanics' liens, or conveyances from a common grantor, or right of possession to public lands may be determined. Thus: A leaseholder estate may be quieted against a third person while the freehold estate is in the landlord and yet, the "title to real property," in its broadest sense, to-wit: The freehold estate of the landlord, is neither disturbed or determined. It is unlike the application of the term "Real property" where degrees of estate are the context as in judgment lien statutes, for here the term from its very necessity must have a more extended meaning and is a clear illustration that "the peculiar sense in which a word is used must be determined by the context. Pot. Dwarris Stat. (1st Ed.) 196, 201.

The complaint in this case is a lucid illustration of the argument. It alleges. (Tr. p. 1.) The plaintiff says: "That she is the owner of those certain unpatented, lode and contiguous group of mining claims, situate * * * That the plaintiff is credibly informed and believes the defendants and each of them make some claims adverse to the plaintiff." The statute creates the form of the complaint. It is alleged that she is the "owner." Anderson in his dictionary, says: "The owner is he who has dominion over a thing which he may use as he pleases, except as restrained by law, or by an agreement. It includes any person having a claim or interest in all the property though less than the absolute fee." "Owner" has "no precise legal signification and may be applied to any defined interest in any estate." Gitchell v. Kridler, 84 Mo. 476. In Lose v. Sullivan, 38 Mich. 171,

a more extended construction is given to the word "owner," for "as applied to real property, it includes any person who has the use of property, control or occupation of the land, whether his interest in it is absolute fee or less than a fee."

Dillman v. Nadelholver, 7 N. E. 86.

Do not these definitions well apply to the case at bar? It is an "ownership in unpatented lode mining claims," the complaint alleges, and the act of Congress defines the nature and character of the estate in unpatented mining claims.

Assignment of Error Two.

> If it should be determined under assignment of error one, that judgment liens in this territory attach to unpatented mining claims, then the question arises: Was the lien extinguished by the conveyance of the mining claims, under the deed of the judgment debtor (E. G. Wager) and his co-owners, to the McCabe Extension Mining and Milling Company, dated August 27, 1900, and the delivery of possession contemporaneously therewith of the mines to the company, an extinguishment of the judgment lien? (Tr. 47. Fdgs. 8-9-10.)

With the delivery of this conveyance the grantors placed the corporation in the actual and exclusive possession. The corporation and the plaintiff as its assignee, ever since have been and the latter is now in such possession, performing each and every year the annual labor on each claim while the corporation and the plaintiff have expended more than $40,000 in improvements since that deed was delivered. Since August 27, 1900, the grantors of the corporation—Wager (the judgment debtor), Wood and Ling—have not been in the possession of any of said mining claims, nor have they since done any annual labor thereon. (id.)

The grant is one of location followed by right of possession with permission to operate: subject to non-commission of waste by cutting timber, etc.; of inheritance and right of purchase. It is subject to conditions subsequent, to-wit: **Abandonment**, and

forfeiture, the latter including advertising out and failure to do the annual labor. It was undoubtedly the intention of Congress to make this grant a personal one to the locator, and to his heirs, and to his assigns, which could not be divested by an involuntary abandonment. Like homesteads, pre-emptions and other like government grants, it could not be the subject of involuntary assignment through sales under execution, attachment, or other involuntary lien. If it had been intended otherwise a word of more enlarged meaning would have been used in the place of "assigns," for in this sense it "is limited to an assignee in fact, and does not comprehend an assignee by operation of law. It would be regarded as a strange construction of the word to extend it to a sheriff, or the creditors whom he represents by reason of the levy of an attachment."

Burlington Nat. Bank v. Beard (Kan.), 42 Pac. 321.

Such grants are to be construed in favor of the government and such grantees. True, this contruction would upset the mining lien laws of and a great number of titles in lode mining States were it to be enforced, but that has been overcome by a long line of decisions, founded on public policy, which, in effect, judicially legislates into the act, for the protection of accrued interests under involuntary assignment, a word of larger meaning than the one used. However, such legislation does not detract from the degree of estate, the quantity of rights granted, or interpretation as applied to the judgment lien statute here. A judgment lien must attach to that character of estate which the debtor cannot, by his act, voluntary or involuntarily, as by conveyance, judicial sale, abandonment or forfeiture, divest the judgment of its lien, for, in judgment liens the estate must be such that the judgment creditor is secured against such acts.

The elements of conditions subsequent as applied to this grant are:

First: Forfeiture.

Second: Abandonment.

Forfeiture. This may occur through advertising out where the estate is abandoned to the co-owner, by virtue of a remedy provided by the statute of grant; and, by failure to do the whole annual labor for a given year, where the estate reverts to the public and becomes unappropriated public lands.

Abandonment. This term is used in a broader sense than forfeiture. It is a constituent element in forfeiture, for there can be no forfeiture to the co-owner or to the government without abandonment. There is no distinction between the two as applied to a loss of the estate by either of them, while abandonment includes loss of the estate to third parties. The acts of the locator in abandoning not only includes the locator's personal actions, intentions, and words, but writtings, as by a conveyance.

Abandonment is created by:

1. Facts constituting a mixed question of law and fact, and,
2. Facts constituting a conclusive act in law.

As to proposition 1: Abandonment is a mixed question of law and fact when it is without a written conveyance, such as giving up the possession without any intention to return. Here the fact of leaving and the fact of intention not to return must be found and determined against the locator, and when so found the law presumes abandonment in law.

Black v. Elkhorn &c Co., 163 U. S. 445.
Lindly on Mines, 643-4.

As to proposition 2: Abandonment is conclusive where there is a conveyance and surrender of possession to the assignee, as there is included in the conveyance both the leaving and intent, for.

> "What could be better evidence of intention to abandon than an actual conveyance of his right to another, ceasing to do any work thereon, and the giving up of his possession in accordance with his conveyance, The

abandonment by simply leaving the land is no more efficacious than conveying his rights and also leaving the possession without any intention of returning."

Black v. Elkhorn Mg. Co. Supra.
Herron v. Eagle M. Co., 61 Pac. 417.
Phoenix &c Co. v. Scott, 54 Pac. 779.
McAllister v. Hutchinson, 75 Pac. 40.

The term or tenure of this mining grant terminates on abandonment or forfeiture, for "An abandonment of it by leaving it, not intending to return, or a conveyance of his interest, to a third party would seem equally to terminate that interest and effectually to bar any possible future claim. **The interest granted by the United States was of such a nature that a conveyance of Black's right to the possession terminated it to the same extent as if it had been forfeited by non-performance of the condition provided for in the statute."** Black v. Elkhorn, Supra. In that case it was held that the grant of a patent to a mining claim did not create a class of real property to which a dower estate would attach. Dower is sometimes termed an estate for life; at other times a contingent interest; it again is called inchoate dower, and by either term it is an estate in land, and if such estate does not attach to a grant of a patent to a mining claim why should a general lien under a docketing statute, as is in question here, attach to an unpatented mining claim, especially after conveyance made. Is it not by the same force of reason that a judgment lien should be terminated by abandonment through conveyance or forfeiture of the estate in such mining claim.

In Moore v. Pitts, 53 N. Y., 90-91, Moore had given a lease to Hall for life. There was a condition written that the lessee "will not sell or assign this lease," and if he "fails in the conditions of this lease, the said Moore will be at liberty to forfeit the lease." Hall assigned the lease to Gillman without the consent of the lessor, and the lessor elected to terminate the lease.. In the meantime Gillman, as the holder of a judgment lien against Hall

and the leasehold, sold the leasehold estate under execution and transferred his interest to Pitts. It was held: "The lien of Gillman's judgment could only attach to such estate as Hall had in the premises. If that estate was subject to be divested by the breach of any conditions subsequent, any such breach as would divest the estate would of necessity destroy the lien." In Stockett v. Howard, 34 Md. 121, it was said: That a judgment lien obtained during the term of a lease is a lien on the term only and ceases to be a lien on the expiration of the term. In the case at bar the term expired with the delivery of the deed of the judgment debtor, and the transfer of possession and with that delivery of deed and transfer of possession went extinguishment of the judgment lien in question.

The authority that creates the power to discover, locate and operate mines (the acts of Congress relating to mining claims) creates the conditions precedent and subsequent, upon which the rights may be held. Among the conditions subsequent are: Forfeiture to the co-owner by advertising out; and forfeiture or abandonment to the government, whereby the privileges revert to the public, or, are abandoned to another. These conditions subsequent the Act of Congress makes personal in the individual. The granted privileges are continued at his will. He is the sole judge of the right to maintain or abandon the estate. No judgment lien creditor can call him to account by laying his acts of abandonment as fraudulent **per se.** It is a part of the law of the land, and the law under which the judgment creditor here claims. As the case now stands, with title quieted in the appellee as to an undivided one-fourth estate in these claims, the appellant and appellee are both claiming under a common grantor—the act of Congress. It is elementary that the holder of title must take notice of conditions subsequent in previous muniments of title which, here, extends back to the acts of Congress, to say noth-

ing of the rule, that every person must take notice of the public laws of the land. The judgment lien creditor is presumed to know of a condition subsequent attached to an estate granted by an act of Congress; he is presumed to know by reference to the recorded deed, of the acts of abandonment by the judgment debtor; he is presumed to know that the judgment debtor had no interest in the mining claims at the time of the levy of the execution dated November 29, 1904, long after the conveyance to the company, and that such levy was subsequent and subject to the rights of the appellant; and, he is presumed to know that the judgment debtor had not performed any annual labor upon the mines since 1900 and that the appellant and her grantor had maintained the annual labor since that year.

Assignment of Error Three.

> There was error of law in holding that the levy made under the execution tested November 29, 1904, issued upon the said judgment of Bennett v. Wager, created a special lien against said property that related back to the date of the docketing of said judgment, and that the sale of said Wager's interest in said mining claims under said execution to the appellee vested in him an interest or title prior and paramount to the interest, possession and title of the appellant.

Our statute of execution enlarges the scope of the writ at common law and extends the right of levy upon interests in lands which the judgment lien statute does not reach.

> Par. 2565 R. S. 1901 reads: "All goods, chattels, moneys and other property, both real and personal, not exempt by law and all property and rights of property seized and held under attachment in the action, are liable to execution. Shares and interests in any corporation or company, and debts and credits choses in action, and all other property, both real and personal, or any interests, legal or equitable, in either real or personal property not capable of manual delivery, may be levied upon and sold under execution."

Par. 345 provides that "The writ of attachment may be levied on such property, and none other as is or may be by law, subject to levy under the writ of execution."

It is from these statutes that the sheriff derives his authority to levy an execution or attachment on legal and equitable interests in real property.

It is a general rule that where there is a subsisting judgment lien and there is a subsequent levy of execution, within the period of limitations, that the levy dated from the date of the attaching of the judgment lien. However, if there is no valid subsisting judgment lien upon the property levied upon by execution, the lien dates only from the date of the levy.

Jeffry v. Moran, 101 U. S. 285.

Sommerville v. Stockton Milling Co., 76 Pac. 246.

The right of levy is not dependent upon the judgment lien. The two liens are independent of each other. They derive their powers from separate and independent statutes. Each may lapse without the other. They may be subject to different limitations of estate, and different statute of limitations. They act in conjunction only where the general lien is a legal valid one, and then, only, can the latter lien be coupled up with the lien of the levy and the latter lien be carried back to the general lien.

Assignment of Error Four.

> The judgment is contrary to the law of the land, in that an unpatented mining claim is not the subject of a judgment lien, and if it were, the lien was destroyed by the judgment debtors abandonment of August 27, 1900.

Appellant contends that the law is, that judgment liens in in this territory do not apply to the estate of a locator in an unpatented mining claim. That if the court holds otherwise, then it is contended that the lien was destroyed by the termination of the estate through abandonment of possession to, and convey-

by the judgment debtor to the corporation August 27, 1900.
er, that the levy of the execution dated November 29, 1904,
ot give a special lien that related back to the date of
dgment, to-wit: December 23, 1899, and being subsequent
e abandonment by the judgment debtor the plaintiff was
ed to a judgment quieting her interest in the whole of the
mining claims against all the defendants in the case, with

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